No. 9790

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Jack Dave Sterling, Bankrupt,

Appellant,

vs.

BOLSA CHICA OIL CORPORATION, a Corporation, THOS. W. SIMMONS, ALLAN A. ANDERSON, WILLIAM H. CREE, H. H. McVICAR, C. M. ROOD, and M. M. McCALLEN CORPORATION, a Corporation,

Appellees.

SUPPLEMENTARY BRIEF OF APPELLEES WILLIAM H. CREE, H. H. McVICAR, C. M. ROOD AND M. M. McCALLEN CORPORATION, A CORPORATION.

CREE & BROOKS,
1216 Security Building, Long Beach,
ELIZABETH R. HENSEL,
410 Park Central Building, Los Angeles,
Attorneys for Appellees William H. Cree, H. H. McVicar, C. M. Rood and M. M. McCallen Corporation.

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SUPPLEMENTARY BRIEF OF APPELLEES.

Opening Statement.

Appellees M. M. McCallen Corporation, a corporation, H. H. McVicar, C. M. Rood and William H. Cree wish to adopt, in so far as it is applicable to them and their position, the brief already filed herein by appellees Bolsa Chica Oil Corporation, Simmons and Anderson. It will serve no purpose and will cumber the Court to go into the questions and argument of the matter which has been so ably covered in that brief. However, these appellees are

in an entirely different position, as a matter of law than the others; they are even farther from the jurisdiction of the Bankruptcy Court. For the sake of making the situation graphic, and at the risk of repeating briefly some facts already contained in the record so far, these appellees submit the following statement of facts:

Statement of Facts.

The Court is well acquainted with the situation which lead up to and immediatly followed the entry of the injunction order in the Referee's Court. Two phrases in that injunction are of particular importance to these appellees. The injunction was addressed to and against "The Bolsa Chica Oil Corporation, its superintendents, agents and employees". [Tr. p. 30.] The injunction prohibited the use of "circulating fluid used in drilling, redrilling or side-tracking of said Petroleum Well." [Tr. p. 31.] This injunction was dated May 15, 1940. [Tr. p. 32.] The alleged damage to the well of the bankrupt estate, due as they claim to mudding up, occurred on June 8, 1940. [Tr. p. 179.] At that time the well was under the management and control and was owned by Bolsa Chica Corporation. The well was transferred to McCallen Corporation by an Assignment of Oil and Gas Lease [Tr. p. 212], and Drilling and Operating Agreement [Tr. p. 202], under date of August 14, 1940. Subsequent to that time, there is no evidence that McCallen Corporation, or any of these appellees conducted any drilling, redrilling or side-tracking operations in the hole at any time. On the contrary, the

evidence shows that the hole was filled with fractured shale body and that it was impossible to penetrate any deeper than 4200 feet. [Tr. p. 233.] This is well above the oil sand and at a point where the testimony shows the appellants had not objected to the use of mud as a circulating fluid. [Tr. pp. 225 and 226.]

These appellees were not parties to the original hearing in which the Trustee asked for instructions and in which the injunctive order was finally entered. They had no opportunity to be heard at that time. They never stipulated or consented to the making or entering of any order against themselves. They appeared, for the first time, in response to the order to show cause on the petition to have Bolsa Chica and themselves certified for contempt issued against them on August 22, 1940, specially and only for the purpose of objecting to the jurisdiction of the Court to hear or determine the matter. [Tr. pp. 164 and 165.] The Court overruled their objection to the jurisdiction but reserved it to be renewed at the conclusion of the evidence. [Tr. p. 178.] The objection was renewed at that time.

The questions involved in this appeal are supplementary to the questions discussed by the other appellees, and are of importance only if the Court finds against Bolsa Chica Oil Corporation, on all points urged in their brief.

Questions Supplementary to Appellee Bolsa Chica Oil Corporation's Brief.

I.

If the Court finds that the injunction was properly issued within the jurisdiction of the bankruptcy court, against Bolsa Chica Oil Corporation, its superintendent, agents and employees, and that said injunctive order had become final, and was not subject to attack in the contempt proceeding, was that injunction valid and subsisting as against a vendee of Bolsa Chica Oil Corporation, a vendee not being a party named or referred to in the injunction?

II.

If such a vendee is bound by such an injunction, can he be held liable for damages arising from acts committed more than two months before he acquires any interest in the property? As a corollary, can such a vendee be liable in a contempt proceeding when he has not done any of the acts prohibited by the injunction?

III.

(a) Where an attorney acquires information in representing one client of the existence of an injunctive order, is he under any obligation to disclose that information to another client, unrelated to the action and not included in the terms of the injunction?

(b) If he is so obligated, may he and his second clients be held liable for violation of the terms of the injunction as aiders and abettors because of the attorney's representation of both clients?

ARGUMENT.

I.

If the Court Finds That the Injunction Was Properly Issued Within the Jurisdiction of the Bankruptcy Court, Against Bolsa Chica Oil Corporation, Its Superintendent, Agents and Employees, and That Said Injunctive Order Had Become Final, and Was Not Subject to Attack in the Contempt Proceeding, Was That Injunction Valid and Subsisting as Against a Vendee of Bolsa Chica Oil Corporation, a Vendee Not Being a Party Named or Referred to in the Injunction?

For the sake of clarity may we designate Bolsa Chica Corporation, Mr. Simmons and Mr. Anderson as the First Appellees and McCallen Corporation, Mr. McVicar, Mr. Rood and Mr. Cree as Second Appellees. First Appellees' brief, we feel, demonstrates that the Court had no jurisdiction to enter the injunction order which is the basis of this contempt proceeding, and that consequently that injunctive order is void and of no effect upon any of the appellees. If the Court disagrees with us, the Second Appellees on this point, may we respectfully submit the following arguments on our own behalf.

Second Appellees were not parties to the injunction proceeding. [Tr. pp. 27 and 29, *et seq.*] They did not acquire title to the property until long after all damage was done and there is no evidence in the record which shows that Second Appellees at any time "drilled, redrilled or side-tracked". The injunction was dated May 15, 1940. [Tr. p. 32.] The damage was done June 8, 1940. [Tr. p. 179.] The transfer to the McCallen corporation was by a usual form of assignment of oil and gas lease and drill-

ing and operating agreement, both dated August 14, 1940. [Tr. pp. 202 and 212.] The first notice to the McCallen Corporation of the injunction was by letter under date of August 21, 1940. [Tr. p. 214.] Second Appellees therefore have never had their day in Court. They have never had an opportunity to be heard as to the merits of their situation. When they were hailed into Court on this contempt citation [Tr. p. 39], they appeared specially only for the single purpose of objecting to the jurisdiction of the Court [Tr. pp. 174 and 175], which objection was overruled with the right reserved to the appellees to renew the objection at the close of the evidence. The objection was then renewed.

It is elementary that a party cannot be divested of rights without a day in Court. It is equally elementary that an injunction cannot be broader than its terms. This injunction made no effort to bind successsors in interest of the Bolsa Chica Oil Corporation. Its terms made it applicable to Bolsa Chica Oil Corporation, its superintendent, agents and employees and their was no mention of vendees, assignees or successors in interest.

An injunction operates *in personam.*

32 *Cor. Jur.* 83;

Scott v. McDonald, 165 U. S. 107, 17 S. Ct. 262, 41 L. Ed. 648;

Taylor v. S. P. Co., 122 Fed. 147.

A person must be a party respondent or defendant or be expressly named in the injunction to be bound thereby. Mere knowledge that an injunction has been issued and

exists is not enough. There must be some definite connecting link between the parties involved.

Gompers v. Stove Co., 221 U. S. 418;
Garrigan v. U. S., 163 Fed. 16;
Kirby v. Society, 95 Cal. App. 757, 273 Pac. 609;
Cohan v. Shibley, 289 Pac. 169.

In the case of *Berger v. Superior Court,* 175 Cal. 719, 167 Pac. 143, 15 A. L. R. 373, an injunction was issued restraining certain parties and organizations, "their officers, members, agents, clerks, attorneys and servants" from picketing a theatre. Berger was not a party to the action and no relation between himself and any of the parties named was shown. He picketed the theatre and during the time he was thus picketing he was served with a copy of the injunction, but continued his activities. In discussing the matter and reversing the trial court, the Court said as follows:

> "The judgment of contempt was based solely on the fact that he did the specified thing, with actual notice that other persons were enjoined from doing the same thing by a judgment in a civil action to which he was not a party and which did not by its terms prohibit him from doing anything."

In discussing the fact that he had actual notice of the injunction, the Court said:

> "But despite expressions in some authorities that at first blush lend support to the contention of respondent, it is generally held that a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms or acting in concert with the enjoined party in support of

his claims. Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107."

The most significant case on this question is that of *Alemite Mfg. Co. v. Staff,* 42 Fed. (2d) 832. The plaintiff sued Joseph Staff, Louis, John and Samuel Staff. John swore that the business was his alone and a dismissal was entered as to Joseph and Louis. Samuel was never served. A decree was entered in the action against John, "his agents, employees, associates and confederates". At that time Joseph was a salesman for John, but he later quit and started in business for himself. It was proved that, in this new business, he infringed the very patent which had been the subject of the injunction. Proceedings to punish for contempt were brought in the original suit. In passing on this point the Court said:

> "We agree that a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law. *Ex Parte* Lennon, 166 U. S. 548, 17 S. Ct. 65, 41 L. Ed. 1110; Conkey v. Russell, 111 Fed. 417; Wellesley v. Mornington, 1 Ch. 545. On the other hand no court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen,* and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful, its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in Court."

In conclusion on this point, then, if the injunction as issued was valid, Second Appellees were not affected or bound by it.

II.

If Such a Vendee Is Bound by Such an Injunction, Can He Be Held Liable for Damages Arising From Acts Committed More Than Two Months Before He Acquires Any Interest in the Property? As a Corollary, Can Such a Vendee Be Liable in a Contempt Proceeding When He Has Not Done Any of the Acts Prohibited by the Injunction?

Second Appellees never violated the injunction in any way. There is not the slightest evidence that they undertook any "drilling, redrilling or side-tracking", or that they used mud as a circulating liquid within 200 feet above the oil sands. [Tr. p. 233.] In fact there is no evidence that the injunction as such was violated at any time *subsequent* to June 8, 1940, if at all. This was a period of two months *prior* to the date that Second Appellees acquired title. How conceivably they could be made responsible for the damage, if any, which was sustained on June 8, 1940, we are at a loss to see.

III.

(a) Where an Attorney Acquires Information in Representing One Client of the Existence of an Injunctive Order, Is He Under Any Obligation to Disclose That Information to Another Client, Unrelated to the Action and Not Included in the Terms of the Injunction?

(b) If He Is So Obligated, May He and His Second Clients Be Held Liable for Violation of the Terms of the Injunction as Aiders and Abettors Because of the Attorney's Representation of Both Clients?

Since Second Appellees were not named in the injunction, were not parties to the action in which it was issued, and have never had a day in Court on the matter, the only conceivable theory upon which they might be susceptible to liability would be that they aided and abetted Bolsa Chica in a fraudulent scheme to violate the injunction by subterfuge. If that is appellant's theory in seeking to impose liability on the Second Appellees, they have fallen dismally short of proving their case. The only evidence in the record which shows any connection between first and second appellees, other than the dubious honor of having been hailed into Court together on the contempt citation, is the fact that during a minor portion of the negotiations after the injunction was issued, William H. Cree represented Bolsa Chica Oil Corporation, as one of its attorneys. He also represents, and has for many years past, McCallen Corporation, McVicar and Rood. It is a fundamental principle of an attorney's code of ethics that all information he acquires from any client is confidential. He is under no duty to disclose any information he acquires from one client to any other client, whether that information is of a personal nature or whether it is a matter of

public record. During his limited representation of Bolsa Chica, Mr. Cree stated that he believed the injunction was invalid and that if he were advising Bolsa Chica what to do, he would tell them to proceed with their drilling operations. Several weeks later the well was sold to his client, McCallen Corporation, but no evidence was offered to show he had any connection with the negotiations for that sale, except for drawing the instruments after the deal had been made. This is the only evidence in the record of a direct or indirect connection between First and Second Appellees. We submit that Mr. Cree was under no obligation to disclose the existence of the injunction to McCallen Corporation, McVicar and Rood. In fact we will go further and state that if he had done so, he would have violated the confidential nature of his relations to his client.

In the matter of *Slater v. Merritt,* 75 N. Y. 268, an injunction was issued restraining a defendant, his attorneys, agents, servants and assistants from entering a certain farm. Thereafter two married daughters of the defendant and his mother occupied the premises. The mother and one of the daughters had been advised by the defendant's attorney to get and keep possession, if they could, he of course knowing of the injunction and being embraced within its terms. The trial court found the defendant and his attorney guilty of contempt. On appeal the appellate court held: first, that before parties can be punished by fine or imprisonment, there must be proof against them tending to show illegal actions; and second, that the above observation applies still more strongly to the case of the attorney. The Court said:

> "Indeed, it can hardly be pretended that there is any evidence against him of counseling or abetting the violation of the injunction unless his admitted advice

> to the grandmother to get possession if she could, as dowress, and his advice to the sister to keep possession under her mortgage is claimed to be such. But this court has recently held in People v. Randall, 73 N. Y. 416, that *where an attorney has two clients, one of whom is enjoined and the other, in an independent position is not enjoined, such attorney cannot ordinarily be charged with violation of the injunction in advising or acting professionally for the latter.* He is enjoined as an attorney for the *defendant merely,* and this cannot limit or restrain his professional action in behalf of others." (Italics ours.)

To the same effect is the case of *In re Watts & Sachs,* 190 U. S. 1, 47 Law Ed. 933, 10 A. B. R.

Furthermore a contempt proceeding against an aider and abettor is by nature a criminal proceeding. It is not remedial, but is for the purpose of punishing the wrong doer for contempt. As in all criminal proceedings, the guilt must be established beyond a reasonable doubt and the punishment is by imprisonment and not in civil damages.

> 32 *Corpus Juris,* 502-3;
> *Garrigan v. U. S.,* 163 Fed. 16, 89 C. C. A. 494;
> *Berger v. Ct., supra.*

There is scarcely any evidence here of any relation between the parties, except as vendor and vendee. There is certainly nothing that would indicate that Second Appellees aided and abetted First Appellees in a scheme to evade an injunction order.

In conclusion, Second Appellees, submit that they have never had their day in Court. They are charged with violation of an injunction to which they were not parties, and in which they were not named. There can be no contention that they consented to the entry of the injunction or that they waived their objection to the jurisdicion of the Bankruptcy Court to hear and determine the controversy as to them. They have been cited for contempt of an injunction which they have not in any way violated, they have not "drilled, redrilled or side-tracked" or used "mud as a circulating fluid" in any of these operations. An attempt is being made to force upon them the onus of an injunction, questionable at best, with which their only connection is that they were represented by the same attorney, who for a short period represented one of the parties named in the injunction.

Respectfully submitted,

CREE & BROOKS, and
ELIZABETH R. HENSEL,
By ELIZABETH R. HENSEL,

Attorneys for Appellees M. M. McCallen Corporation, H. H. McVicar, C. M. Rood and William H. Cree.